

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO

3 CHICO SERVICE STATION, INC.,
4 and JOSÉ CHICO,

5 Plaintiffs,

6 v.

7 SOL PUERTO RICO LIMITED,

8 Defendant.

Civil No. 09-1342 (JAF)

9 **OPINION AND ORDER**

10 Plaintiffs, Chico Service Station, Inc., and José Chico, bring this action against
11 Defendant, Sol Puerto Rico Limited, under the Resource Conservation and Recovery Act
12 (“RCRA”), 42 U.S.C. § 6972(a), seeking civil penalties and injunctive relief for Defendant’s
13 alleged release of hazardous materials on Plaintiffs’ real property. (Docket No. 1.) Defendant
14 moves for dismissal (Docket No. 6), Plaintiffs oppose (Docket No. 17), and Defendant replies
15 (Docket No. 20).

16 **I.**

17 **Factual and Procedural Synopsis**

18 We draw the following facts from the pleadings and Defendant’s submissions in support
19 of its motion. (Docket Nos. 1; 6; 21.) Since April 9, 1987, Plaintiff Chico has been the
20 proprietor of Plaintiff Chico Service Station, which is located in Río Grande, Puerto Rico.

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1 Defendant is a licensee of Shell Company (Puerto Rico) Limited (“Shell”) and has assumed
2 Shell’s obligations in Puerto Rico.

3 Shell had owned and operated underground fuel storage tanks on Plaintiffs’ real property
4 since the 1960s. In 1993, Shell informed the Puerto Rico Environmental Quality Board (“EQB”)
5 of liquid hydrocarbon substances floating above the groundwater beneath Chico Service Station.
6 In April 2008, Defendant conducted a soil and groundwater test at the site and discovered high
7 concentrations of dissolved benzene in the groundwater beneath Chico Service Station that were
8 well in excess of the federal environmental standard.

9 On August 14, 2003, Plaintiffs filed suit against Shell in the Court of First Instance of the
10 Commonwealth of Puerto Rico. (Docket Nos. 6-10; 21-9.) Plaintiffs alleged, inter alia, that
11 Shell may have caused irreparable environmental damage to Plaintiffs’ real property. (Id.)
12 Plaintiffs prayed for both damages and an injunction to compel Shell to conduct environmental
13 tests of the site, carry out any necessary cleanup, and assume the cost of such remedial measures.
14 (Id.) On December 31, 2003, the parties stipulated to a partial dismissal of Plaintiffs’ claim for
15 injunctive relief under a settlement agreement. (Docket Nos. 6-13; 21-12.) Shell undertook to
16 remove the storage tanks from the site, conduct soil testing for pollutants, and engage in any
17 remedial measures that EQB may reasonably require. (Id.) On January 15, 2004, the court
18 entered judgment pursuant to the agreement. (Docket Nos. 30-4; 34-4.)

19 In March 2004, Shell removed five storage tanks and connected lines. (Docket Nos. 6-
20 14; 21-13.) Shell then submitted a report on the removal to EQB on May 14, 2004. (Docket

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1 Nos. 6-16; 21-15.) EQB replied on July 6, 2004, informing Shell that, despite the removal, the
2 site remained listed as a contaminated facility that required corrective action. (Docket Nos. 6-17;
3 21-16.) EQB demanded that Shell submit a remedial plan before undertaking cleanup. (Id.)

4 On October 1, 2004, Shell submitted the plan as requested, which detailed tests that were
5 to be conducted on the soil and underground water at the site. (Docket Nos. 6-18; 21-17.) On
6 December 10, 2004, EQB notified Shell of its provisional approval of the plan, which required
7 Shell to inform EQB about the direction of the water flow at the site and ensure that EQB agents
8 observe the taking of soil samples. (Docket Nos. 6-19; 21-18.) EQB informed Shell that the site
9 remained on the list of facilities requiring remediation. (Id.)

10 On January 17, 2005, Shell requested that Plaintiffs grant it access to the site at the end
11 of the month to conduct the necessary tests pursuant to its remedial plan. (Docket Nos. 6-20;
12 21-19.) On December 19, 2006, Plaintiffs requested EQB to send them copies of
13 correspondences between EQB and Shell in reference to the cleanup and inquired into the reason
14 for the apparent delay since Shell's submission of its plan. (Docket Nos. 6-21; 21-22.)

15 On January 16, 2007, Defendant submitted a report on its soil sampling to EQB. (Docket
16 Nos. 6-23; 21-22.) On May 16, 2008, Defendant submitted a supplemental report based on
17 sampling conducted in April 2008. (Docket Nos. 6-24; 21-23.) On May 28, 2008, Plaintiffs
18 wrote to EQB, asserting that Defendant had not complied with its remedial plan from 2004.
19 (Docket Nos. 6-25; 21-24.)

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1 Plaintiffs commenced another action in the Court of First Instance on October 10, 2008,
2 petitioning the Commonwealth court for a writ of mandamus against EQB. (Docket Nos. 6-27;
3 21-26.) On January 16, 2009, Plaintiffs and EQB concluded a settlement agreement, under
4 which the parties stipulated that EQB would resolve the administrative proceedings pertaining
5 to Plaintiffs' property and afford Plaintiffs an opportunity to be heard and that the parties would
6 present their arguments before EQB, not the Commonwealth court. (Id.) Pursuant to the
7 agreement, the Commonwealth court dismissed the petition as moot on February 4, 2009. (Id.)

8 Meanwhile, on November 25, 2008, EQB informed Defendant that the agency had
9 rejected Defendant's January 2007 report because it lacked the appropriate standards for a proper
10 evaluation. (Docket Nos. 6-28; 21-27.) EQB advised Defendant that it was in the process of
11 developing these standards in concert with the federal Environmental Protection Agency
12 ("EPA") and that EQB would inform the public once the new guidelines were officially
13 implemented. (Id.) EQB also noted deficiencies in Defendant's testing methods. (Id.) On April
14 14, 2009, Defendant responded to EQB's letter dated January 22, 2009, which had informed
15 Defendant that its May 2008 supplemental report had been rejected because it related to the
16 earlier report from January 2007. (Docket Nos. 6-30; 21-29.)

17 On April 14, 2009, Plaintiffs commenced this case in federal district court. (Docket
18 No. 1.) On May 5, 2009, Defendant moved to dismiss for lack of subject-matter jurisdiction.
19 (Docket No. 6.) Plaintiffs opposed on May 26, 2009 (Docket No. 17), and Defendant replied
20 on May 28, 2009 (Docket No. 20). On October 14, 2009, we ordered Plaintiffs to show cause

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as to why we should not dismiss their complaint on the basis of res judicata (Docket No. 29); Plaintiffs filed a brief pursuant to our order on October 29, 2009 (Docket No. 30), and Defendant filed a response on November 3, 2009 (Docket No. 33).

II.

Standard for Dismissal Under Rule 12(b)(1)

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a movant may challenge the court's subject-matter jurisdiction under a factual challenge by controverting the plaintiff's jurisdictional allegations when they are distinct from the case's merits. Valentín v. Hosp. Bella Vista, 254 F.3d 358, 363 (1st Cir. 2001). The court then addresses "the jurisdictional claim by resolving the [predicate] factual disputes." Id. The party asserting jurisdiction bears the burden of showing its existence. See Skwira v. United States, 344 F.3d 64, 71 (1st Cir. 2003).

III.

Analysis

A. Order to Show Cause

On October 14, 2009, we ordered Plaintiffs to show cause as to why we should not dispose of their complaint by applying the earlier settlement between the parties dated December 31, 2003 (Docket Nos. 6-13; 21-12), as res judicata. (Docket No. 29.) On October 29, 2009, Plaintiffs filed a motion in compliance, noting that the earlier partial stipulated dismissal did not indicate that it was with prejudice to further litigation. (Docket No. 30.)

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1 Under Rule 39.1 of the Rules of Civil Procedure for the General Court of Justice of 1979,
2 a stipulated judgment is without prejudice if it is silent on the matter. 32 L.P.R.A. App. III
3 (2000). Defendant argues that the policy of finality of judgment and the intent of the parties to
4 dispose of the remedial claim under the settlement militate in favor of res judicata. (Docket
5 No. 33.) The appropriate standard, however, is whether the courts of Puerto Rico “would
6 ascribe preclusive effect to the judgment.” Boateng v. InterAmerican Univ., Inc., 210 F.3d 56,
7 61 (1st Cir. 2000). The earlier dismissal omitted any reference to prejudice to subsequent
8 litigation. (Docket Nos. 30-4; 34-4.) We, therefore, accept Plaintiffs’ argument and now
9 address Defendant’s contentions against our subject-matter jurisdiction (Docket No. 6).

10 **B. Abstention Doctrine**

11 In their complaint, Plaintiffs accused Defendant of violations of federal statutes pertaining
12 to the handling and disposal of hazardous wastes and underground storage tanks and of
13 contribution to improper handling of waste matter (Docket No. 1). See 42 U.S.C. §§ 6903,
14 6921-6939e, 6991-6991i, 6972(a)(1). The RCRA authorizes private civil actions to enforce
15 federal standards pertaining to the handling of hazardous wastes and underground storage tanks
16 against private parties. § 6972(a)(1). Moreover, benzene is listed as a hazardous waste material.
17 40 C.F.R. § 261.31(a).

18 Defendant moves to dismiss on the basis of, inter alia, federal abstention doctrine.
19 (Docket No. 6.) Defendant cites Burford v. Sun Oil Co., 319 U.S. 315 (1943), and Colorado
20 River Water Conservation District v. United States, 424 U.S. 800 (1976), in support.

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1 In general, “federal courts have a strict duty to exercise the jurisdiction that is conferred
2 upon them by Congress.” Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996).
3 Nevertheless, “in certain circumstances a federal court [must] abstain in favor of state processes
4 where federal litigation would interfere with a state administrative scheme and where adequate
5 state judicial review exists.” Sevigny v. Employers Ins. of Wasau, 411 F.3d 24, 26 (1st Cir.
6 2005). “The fundamental concern in Burford is to prevent federal courts from bypassing a state
7 administrative scheme and resolving issues of state law and policy that are committed in the first
8 instance to expert administrative resolution.” Id. at 27 (citing Pub. Serv. Co. v. Patch, 167 F.3d
9 15, 24 (1st Cir. 1998)).

10 Where timely and adequate state-court review is available, a
11 federal court sitting in equity must decline to interfere with the
12 proceedings . . . of state administrative agencies: (1) when there
13 are ‘difficult questions of state law bearing on policy problems
14 of substantial public import whose importance transcends the
15 result in the case then at bar’; or (2) where the ‘exercise of
16 federal review of the question in a case and in similar cases
17 would be disruptive of state efforts to establish a coherent
18 policy with respect to a matter of substantial public concern.’

19 New Orleans Pub. Serv., Inc. v. Council of New Orleans (NOPSI), 491 U.S. 350, 361 (1989)
20 (quoting Colo. River, 424 U.S. at 814).

21 “[F]ederal courts have the power to dismiss . . . cases based on abstention principles only
22 where the relief being sought is equitable or otherwise discretionary.” Quackenbush, 517 U.S.
23 at 731. Abstention may extend to suits for damages where federal adjudication could interfere
24 with state proceedings, but the federal court may only stay the action pending resolution of the

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1 state proceedings, rather than dismissing the case outright.¹ Id. at 730. Abstention
2 presumptively applies where a state agency has rendered a decision. Sevigny, 411 F.3d at 28.

3 As the applicability of abstention doctrines to the RCRA remains an issue of first
4 impression in the First Circuit, we look to our sister jurisdictions for guidance. In an analogous
5 scenario, the Sixth Circuit applied NOPSI to abstain where the state of Kentucky evinced a clear
6 interest in hazardous waste disposal by enacting a broad statutory scheme and an administrative
7 process governing permits for hazardous waste facilities; federal adjudication would have been
8 “disruptive of Kentucky’s efforts to establish a coherent policy with respect to the licensing of
9 hazardous waste facilities”; and it was impossible to disentangle the federal claim from state law
10 because the state regulatory scheme explicitly incorporated RCRA provisions. Coal. for Health
11 Concern v. LWD, Inc., 60 F.3d 1188, 1194 (6th Cir. 1995). Furthermore, Judge Posner of the
12 Seventh Circuit has opined that abstention may apply “in cases in which a state has a formal
13 administrative proceeding in progress that the citizens’ suit would disrupt.” PMC, Inc. v.
14 Sherwin-Williams Co., 151 F.3d 610, 619 (7th Cir. 1998) (noting that affirmative defense of
15 diligent state prosecution under 42 U.S.C. § 6972(b)(2)(C) applies only to civil cases in judicial
16 court, not administrative proceedings).

¹ Similarly, under Colorado River abstention, the court may only stay proceedings pending the outcome of parallel state proceedings, not dismiss the federal case in its entirety. Rivera-Feliciano v. Acevedo-Vila, 438 F.3d 50, 60 (1st Cir. 2006).

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1 Based on the available record and Commonwealth laws and regulations, we find
2 compelling reasons to abstain from adjudicating the instant case. At the threshold, the record
3 abounds with evidence of adequate judicial review in the Commonwealth courts with respect to
4 the underlying dispute. At the moment, two Commonwealth judgments govern the matter at
5 hand. Under its stipulated partial dismissal of December 31, 2003, Defendant has undertaken
6 to subject itself to scrutiny by EQB with respect to its handling of storage tanks and potential
7 contamination on Plaintiffs' property. (Docket Nos. 6-13; 21-12.) Also, under a subsequent
8 settlement agreement dated January 31, 2009, EQB must afford Plaintiffs an opportunity to be
9 heard in the proceedings relating to Plaintiffs' property, and EQB must bring the matter to a
10 close. (Docket Nos. 6-27; 21-26.) We further note that Puerto Rico law generally provides for
11 judicial review of administrative agency decisions. See 3 L.P.R.A. §§ 2171-2177 (2006).
12 Accordingly, we find that adequate recourse may be had in the local courts for EQB decisions
13 so as to implicate the rule in NOPSI. See 491 U.S. at 361.

14 We note that, like Kentucky, Puerto Rico has adopted a regulatory scheme pertaining to
15 underground storage tanks. See generally "Reglamento para el Control de los Tanques de
16 Almacenamiento Soterrados," EQB No. 4362 (Nov. 7, 1990). In their complaint, Plaintiffs
17 explicitly refer to several provisions of these regulations as a measure of Defendant's alleged
18 violations. (Docket No. 1.) EQB's ongoing correspondence with the parties in this case
19 confirms that Puerto Rico has a substantial policy interest in the uniform regulation of

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1 underground storage tanks, akin to that of Kentucky's oversight of hazardous wastes. See Coal.
2 for Health Concern, 60 F.3d at 1194.

3 Moreover, federal judicial intervention in this case could interfere with the uniform
4 formation and application of environmental regulations by EQB with respect to underground
5 storage tanks and hazardous effluents from these tanks. EQB's letter to Defendant dated
6 November 25, 2008, indicated that EQB and EPA were engaged in a joint effort to create
7 appropriate guidelines for underground storage tanks, which must then undergo a public review
8 process before formal promulgation. (Docket Nos. 6-28; 21-27.) EQB cited this rationale in
9 rejecting Defendant's report on soil testing at Plaintiffs' site and instructed Defendant to await
10 the adoption of uniform rules. (Id.) Our adjudication of Plaintiffs' case at this juncture would
11 essentially sidestep the efforts of EPA and EQB, both expert agencies in the field of
12 environmental regulation, and potentially disrupt uniform regulation of underground storage
13 tanks by rendering a decision that is contrary to the contemplated guidelines. See NOPSI, 491
14 U.S. at 361; Coal. for Health Concern, 60 F.3d at 1194.

15 Furthermore, Puerto Rico's regulation of underground storage tanks is entangled with
16 federal regulation, because EPA has expressly delegated authority to EQB to formulate
17 guidelines. See 40 C.F.R. § 282.102. Plaintiffs correctly note that EPA has not similarly
18 delegated authority to EQB with respect to the control of hazardous waste material (Docket
19 No. 17). See id. §§ 272.2650 - .2699. However, judicial intervention in the area of hazardous
20 effluents from underground tanks would impinge on the control of the tanks themselves.

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1 Because EQB has not rendered a final decision in this matter, there is no presumption in
2 favor of abstention. See Seigny, 411 F.3d at 28. Nevertheless, Defendant has adduced
3 evidence of ongoing administrative proceedings relating to the res in the instant case. Moreover,
4 because Plaintiffs have stipulated to the resolution of their grievances before EQB in lieu of
5 judicial oversight in the Commonwealth courts (Docket Nos. 6-27; 21-26), there is no unfairness
6 in permitting the agency to work unimpeded. We heed Judge Posner's admonition against
7 permitting civil suits to disrupt concurrent administrative proceedings. See PMC, 151 F.3d at
8 619. We, therefore, hold that, in view of the conjunction of keen local interest in uniform
9 regulation and parallel proceedings, judicial prudence favors abstention in the present case. See
10 NOPSI, 491 U.S. at 361; Coal. for Health Concern, 60 F.3d at 1194.

11 Lastly, we note that the relief sought by Plaintiffs in this case does not prevent us from
12 disposing the complaint in its entirety. In addition to their prayers for injunctions, Plaintiffs
13 demand the imposition of civil penalties against Defendant. (Docket No. 1.) In Tull v. United
14 States, the Court held that a defendant's liability for civil penalties under the Clean Water Act
15 was the proper province of the jury, not the equitable discretion of the judge. 481 U.S. 412, 423
16 (1987). The Tull Court reasoned that civil penalties are punitive rather than restorative, and
17 hence not the sort of relief that courts in equity could grant at common law. Id. at 422. In
18 reaching its conclusion that "the nature of the relief authorized" was a claim at law, the Court
19 pointed to the statutory structure, which set out injunctive relief separately from the provision

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1 for civil penalties. Id. at 423, 425. Despite committing the issue of liability to the jury, Tull
2 permits the judge considerable discretion to assess the amount of penalty if any. Id. at 427.

3 We find no controlling decisions interpreting the civil penalty provision under the RCRA
4 in light of Tull. However, in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.,
5 the Court distinguished Tull, finding that the civil penalty provision for citizens' suits under the
6 Clean Water Act was entwined with the provision's authorization of equitable remedies. 484
7 U.S. 49, 59 (1987). Because both remedies were referenced in the same subsection, the Court
8 held that citizens' claims for civil penalties necessarily became bills in equity. Id. at 58-59.

9 In this case, the RCRA provision for civil penalties in citizens' suits follows the
10 authorization of injunctive relief in the same sentence. 42 U.S.C. § 6972(a). Under Gwaltney,
11 we hold that citizens' actions for civil penalties under the RCRA are claims in equity. See 484
12 U.S. at 58-59. In view of the equitable nature of the remedies sought by Plaintiffs, and our broad
13 discretion to assess civil penalties, Tull, 481 U.S. at 427, we may dismiss Plaintiffs' case in its
14 entirety under the Burford abstention doctrine.² See Quackenbush, 517 U.S. at 731.

² Because we dismiss Plaintiffs' case on the basis of abstention, we need not consider Defendant's remaining arguments against jurisdiction (Docket No. 6).

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IV.

Conclusion

Accordingly, we hereby **NOTE** Plaintiffs' motion in compliance (Docket No. 30), and **GRANT** Defendant's motion to dismiss (Docket No. 6). We **DISMISS** Plaintiffs' complaint on Burford abstention considerations.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 4th day of December, 2009.

s/José Antonio Fusté
JOSE ANTONIO FUSTE
Chief U.S. District Judge